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Utah Supreme Court

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6237

IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIS L. MARKS,

Plaintiff,

v.

WHITE FAWN MILLING CORPORA-
TION, a Utah Corporation,

Defendant,

WALKER BANK & TRUST COMPANY,

Receiver,
Respondent,

T. H. HUMPHREYS, State Engineer of the
State of Utah,

Appellant,

No. 6229

T. H. HUMPHREYS, State Engineer of
the State of Utah,

Plaintiff,
Appellant,

MAXFIELD FEED & COAL, INCORPOR-
ATED, A Corporation, Successor in In-
terest to White Fawn Milling Corpora-
tion, a Utah Corporation,

Defendant,
Respondent.

No. 6287

APPELLANT'S BRIEF

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East Jordan Irrigation Company,
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tion, a Utah Corporation,

Defendant,
Respondent.

No. 6287

APPELLANT'S BRIEF

Statement of the Case

This appeal raises a question of the proper construction of Section 100-5-1, Revised Statutes of Utah, 1933, as amended by C. 105, Laws of Utah, 1935, which section provides for appointment of water commissioners

by the State Engineer and authorizes the State Engineer to levy and collect assessments to pay the expenses of such commissioners. Two proceedings were instituted by the State Engineer to collect water assessments aggregating \$375.32 which were levied against a water right on the Jordan River owned by the White Fawn Milling Corporation. Decisions adverse to the contention of the State Engineer were rendered in both cases and appeals were taken to this court. The two appeals were, by order of this court, consolidated for the purpose of hearing.

Louis L. Marks v. White Fawn Milling Corporation

Case No. 6229

During the years 1937, 1938, and part of 1939, the White Fawn Milling Corporation was the owner of a right to use water of the Jordan River for milling purposes. The water to which the Milling Company was entitled was distributed during those years by a water commissioner appointed by the State Engineer pursuant to the provisions of Section 100-5-1, Revised Statutes of Utah, 1933, and assessments against the claimant were levied by the State Engineer in order to pay the salary and expenses of the commissioner. The prorata share charged against the White Fawn Milling Corporation was \$142.40 for 1937; \$120.96 for 1938; and \$111.96 for 1939. The assessments were levied on or about May 1 of each year, as provided by the statute.

On June 10, 1939 the Third Judicial District Court of this State appointed Walker Bank & Trust Company as Receiver to take over all of the assets of the White Fawn Milling Corporation, and thereafter notice was given requiring creditors to file claims on or before August 13, 1939. On June 21, 1939 the State Engineer filed his claim for the assessments mentioned above, claiming preference for such claim under the provisions of Title 100, Revised Statutes of Utah, 1933. In a petition for approval, allowance of claims, disallowance of claims, and authority to pay dividends, the Receiver alleged that the property of the White Fawn Milling Corporation, including its right to the use of the waters of the Jordan River, had been sold and that it had received as proceeds of such sale approximately \$10,000. The claims are listed in the petition, and it is alleged that the claim of T. H. Humpherys as State Engineer covering said assessments should be denied as a preferred claim but allowed as a common claim. The appellant made a timely objection in writing to that part of the petition in which the Receiver recommended denial of the claim as a preferred claim, and at the time of hearing of the petition appeared before the court in support of its objection. The court, nevertheless, under date of December 22, 1939, by order adopted the recommendations of the Receiver and disallowed the appellant's claim as a preferred claim but allowed it as a common claim. Common creditors were paid only 25 per cent of their claims. Appellant assigns as error the making and entering of such order.

**T. H. Humphreys v. Maxfield Feed & Coal,
Incorporated**

Case No. 6287

On March 16, 1940, the State Engineer brought suit against Maxfield Feed & Coal, Incorporated, a corporation, purchaser of the White Fawn property, including its water rights, from the Receiver, seeking to restrain it from using water from Jordan River until the delinquencies mentioned above had been paid. It is alleged in the complaint that the State Engineer notified the defendant to pay all delinquencies forthwith or it would be forbidden the use of water from Jordan River, as provided by Section 100-5-1, Revised Statutes of Utah, 1933, but that nevertheless the defendant has refused to pay such delinquencies, and, unless restrained by the court, the defendant will continue to use the water of Jordan River without paying delinquent water assessments. To this action the defendant answered, admitting that that assessments were levied against its predecessors, denying that it had assumed the obligation to pay past assessments by purchasing the White Fawn water right, and alleging that the State Engineer filed his claim for water assessments with the Receiver of the Milling Company, that the claim was disallowed as a preferred claim but was allowed as a common claim, and that the Receiver had paid to defendant as a dividend 25 per cent of its claim which amounted to \$93.83. It is further alleged in the answer that the water right in question was conveyed to the defendant by means of a receiver's deed, which is attached to the answer as Exhibit "A".

The case was tried on the pleadings and upon a stipulation of facts. It was admitted by the defendant in open court that the assessments mentioned in the complaint were duly levied by the State Engineer prior to the receivership and prior to the transfer to Maxfield Feed & Coal, Incorporated, and that the amounts set forth in the complaint were correct. It was admitted by the plaintiff that he had filed a claim for \$375.32 with the Receiver covering the water assessments in question and that the claim was disallowed as a preferred claim but was allowed as a common claim, and that the Receiver paid a dividend on the claim, but that such dividend was accepted by the State Engineer upon a written stipulation that it would not prejudice his rights to pursue his claim as a preferred claim. The court made findings of fact in accordance with the stipulation of the parties, concluded that the plaintiff was entitled to no relief, and entered a decree dismissing the suit. The appellant assigned as error the conclusion of law and the decree.

Argument

It will be observed that the State Engineer has by this litigation attempted collection of delinquent water assessments from both the seller and the buyer. It is his contention that he is entitled to payment of his claim, either by the Receiver from the proceeds of the sale or by the transferee of the water right, or he is entitled to a judgment enforcing his order forbidding the use of water until the water assessments are paid in full. The

question in both cases is primarily one of statutory construction. Section 100-5-1 provides in part as follows:

“Whenever in the judgment of the state engineer or the district court, it is necessary to appoint one or more water commissioners for the distribution of water from any river system or water source, such commissioner or commissioners shall be appointed annually by the state engineer, after consultation with the water users. The form of such consultation and notice to be given shall be determined by the state engineer as shall best suit local conditions, full expression of majority opinion being, however, provided for. If a majority of the water users, as a result of such consultation, shall agree upon some competent person or persons to be appointed as water commissioner or commissioners, the duties he or they shall perform and the compensation he or they shall receive, and shall make recommendations to the state engineer as to such matters or either of them, the state engineer shall act in accordance with their recommendations; but if a majority of water users do not agree as to such matters, then the state engineer shall make a determination for them. The salary and expenses of such commissioner or commissioners shall be borne pro rata by the users of water from such river system or water source, upon a schedule to be fixed by the state engineer, based on the established rights of each water user, and such prorata share shall be paid by each water user to the state engineer in advance on or before the first day of May each year, and upon failure so to do the state engineer may forbid the use of water by any such delinquent while such default continues, and may bring an action in the district court for such unpaid ex-

pense and salary, or the district court having jurisdiction of his person may issue an order to show cause upon any delinquent user why a judgment for such sum should not be entered. Any such commissioner or commissioners may be removed by the state engineer for cause. The users of water from any river system or water source may petition the district court for the removal of any such commissioner or commissioners, and after notice and hearing the court may order the removal of such commissioner or commissioners and direct the state engineer to appoint successors as necessary.”

Under familiar rules of statutory construction, the courts must determine the intent and purpose of the legislature in enacting the law and, if necessary, must liberally construe the statute to effect that purpose. Section 88-2-2, Revised Statutes of Utah, 1933, provides:

“The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes established the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.”

See also to the same effect *Baker v. Latses*, 60 Utah 38, 206 P. 553; *Utah Association of Life Underwriters v. Mountain States Insurance Company*, 58 Utah 579, 200

P. 673; *Houston Real Estate Company v. Hechler*, 44 Utah 64, 138 P. 1159; *State v. Hendrickson*, 67 Utah 15, 245 P. 375; *State v. Franklin*, 63 Utah 442, 226 P. 674; *Board of Education of Carbon County School District v. Bryner*, 57 Utah 78, 192 P. 627; see large number of cases collected, 59 C. J. 973; 59 C. J. 1129.

It is a fundamental concept of the water law of Utah and other western States that water in its natural source is the property of the public. This concept has been declared by the legislature many times both before and after statehood. Water in a natural source can never be privately owned even by the State or the United States. All that can be acquired is a right of use. The legislature has prescribed conditions under which water may be appropriated and used and conditions under which water rights are terminated. One condition to enjoyment of such rights which found its way into the law before any legislation on the subject makes necessary a continuous beneficial use of water.

If any person entitled to the use of water shall, for a period of five years, fail to put the water so claimed to a beneficial use, the right of use ceases. It is immaterial whether the right reverts to the State or accrues to other appropriators; the fact is that the right of the delinquent is terminated. In a like manner, if the owner of the right of use fails to pay the duly and legally levied assessment of the State Engineer for the distribution of water, his right may be terminated during the period of such delinquency.

It cannot be logically contended that the mere transfer of title can revive this right. The only method of reviving the right is to pay the assessment. This burden must be borne by the one who would exercise the right, whether it be the one who claimed the water when the assessment was levied or a transferee thereafter.

Assume that instead of authorizing the State Engineer to levy assessments, as provided by the statute, in order to cover the cost of the service by the State Engineer, the legislature should provide for the levying of a tax upon the use of water. Under such procedure, it would be obvious that the owner of the water could not free the water from the tax merely by deeding his water away. Under the law, where a farm is sold for delinquent taxes, the water right appurtenant to the farm is impressed with the lien of the tax and passes upon the tax sale with the land.

The assessments made by the State Engineer in many respects are like a special tax. We respectfully urge that these assessments are impressed upon the property itself, and follow it into the hands of successive claimants. If this be true, the lien or condition precedent to the continued use of the water cannot be discharged by any payment of a prorata part of the assessment, but the right is restored only, as in the case of a tax, by the payment in full of the amount due.

The objects and purposes of the section of the statute under consideration may be gathered from the whole

of Title 100, which relates to water and irrigation. Section 100-2-1 authorizes the Governor to appoint a State Engineer and, among other things, provides that the State Engineer shall distribute the waters of the State to those entitled thereto according to the administration and distribution of water and sets up an orderly procedure based on democratic principles for the appointment of water commissioners. It prescribes the duties of such commissioners and, necessarily, provides for payment of expenses by those to be benefited.

It is apparent the legislature intended that (1) water is to be distributed by public officers, to wit: the State Engineer and his commissioners; (2) such commissioners must be appointed after consultation with the water users in accordance with the wishes of the majority; (3) commissioners must be paid by those benefited, namely, the water users; and (4) the plan of payment for the services of the commissioners contemplates collection of assessments by the State Engineer as an agent of the users. To enforce payment, the State Engineer is authorized to forbid the use of water by any such delinquent while the default continues, *and* he may bring an action in the district court for such unpaid expense and salary, of the district court, having jurisdiction of the person of the water user, and may issue an order against any delinquent user requiring him to show cause why judgment for such sums should not be entered.

The legislature intended by the language used to give the State Engineer two remedies one in rem and

one in personam. Upon breach of the condition requiring payment of expense of distribution he may deny the use of water. It should be noted in this connection that there is no language to the effect that the first remedy is applicable only when the water right is owned by the person against whom the assessment was levied. *The statute gives the State Engineer unlimited and unqualified authority to forbid the use of water until delinquencies are paid.*

If the language of the statute is construed in accordance with the intention of the legislature, and it must be and, if it is construed liberally to make effective the powers granted to the State Engineer to collect water assessments, the court must hold that the law giving the State Engineer the right to forbid the use of the water to enforce collection imposes some sort of a statutory charge or condition upon a water right which cannot be defeated by mere assignment or transfer of the right. If payment of a water assessment may be so easily defeated, an insolvent water user could simply transfer his water right around the family or among friends every year and avoid payment. If assessments do not follow the right, the State Engineer could not successfully forbid the use of water by the assignee of the right, and the object and purpose of the statute to make collection of water assessments as effectual as possible would be circumvented.

As stated above, the statute requires all water users to share the expense of water commissioners upon a pro-

rata basis. If the obligation against the water may be disposed of by assignment, other users from the same source must make up deficiencies resulting therefrom. The State Engineer must in such case make a new levy to pay bills which were successfully avoided by transfer.

The court has already had under consideration the question as to whether the State Engineer in collecting water assessments must proceed against one who by contract assumed the obligation to pay assessments instead or against the water user directly liable. In the case of *Minersville Reservoir & Irrigation Company v. Rocky Ford Irrigation Company*, 90 Utah 283, 61 P. (2d) 605, the court made the following remarks which are pertinent here:

“Plaintiff is a water user of Beaver river and as such is clearly liable to the state engineer for the payment of its pro-rated share of expenses incident to the services rendered by the water commissioner. Plaintiff may not escape that liability to the state engineer so long as it remains a water user. The right of the state engineer to collect assessments from the water user cannot be defeated by an attempt of the water user to assign its liability for the payment thereof to another. The burden of the liability is not so easy to escape. If it were, all of the water users of a stream or other source of supply might assign their liability to pay water assessments to some irresponsible person and thus render collection impossible .

“It is plaintiff’s contention that an assessment made by the state engineer on its water right is an encumbrance thereon or when not paid becomes

such within the meaning of the contract. The defendant contends to the contrary. Each of the parties have cited cases and texts dealing with incumbrances. We have examined these cases and texts but find them of little aid to us in the present injury. Generally speaking, an "incumbrance" is a burden or charge on property. *In a sense an unpaid water assessment becomes an incumbrance against the water right when the state engineer refuses to deliver the water because the assessment is not paid.* R. S. 1933, 100-5-1, vests in the state engineer, in the event the assessments are not paid, authority to "forbid the use of water by any such delinquent while such default continued," or he may bring an action in the district court for unpaid expenses and salary, or the district court, having jurisdiction of the person, may issue an order directing a delinquent user to show cause why a judgment for such sum should not be entered against him. If the language relied upon by plaintiff is given the broad meaning contended for, it would follow that the defendant would be obligated to pay an incumbrance placed on its water right by the plaintiff itself. That such was not the intention of the parties is not open to doubt. If we are correct in the view heretofore expressed in this opinion that plaintiff owes a duty which it may not escape to pay the state engineer the assessment levied against its water right, it follows that plaintiff may not be heard to complain when its property becomes incumbered because of its failure to perform that duty."

.. If, as stated by this court, the legislature did not intend that collection of water assessments can be defeated or made more difficult by contracts between water users, it, to be consistent and to give effect to the pur-

pose and policies of the statute, must hold that the obligation against the water right cannot be avoided by transfer. In this case it cannot be contended that the Maxfield Feed & Coal, Incorporated, was a purchaser without notice of the claim of the State Engineer. Such claim had been filed with the Receiver as a preferred claim before Maxfield Feed & Coal, Incorporated, became a purchaser.

It will be noted that under the language of the statute the remedies of the State Engineer are not stated in the alternative but are stated cumulatively. The State Engineer may forbid the use of water *and* sue for the amount due. Both remedies have been pursued in an effort to collect the delinquent water assessment against the White Fawn right, and it is respectfully submitted that either the Receiver must pay the claim in full or the State Engineer's order forbidding the use of water until the assessment is paid must be enforced.

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